IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE

WRIT PETITION NO. 1157 OF 1994

Secretary,
Chowke Panchakroshi Sikshan
Prasarak Mandal & another .... Petitioner

versus

Dilip A Narvekar and another..... Respondent.

Shri B.G. Tangsali for the petitioner
Shri N.V.Walawalkar i/b G.H. Keluskar for Respondent no.1
Shri A.P.Vanarse AGP for Respondent no.2.

CORAM; A.P. DESHPANDE, J.
DATED; 30TH MARCH, 2007

JUDGMENT;

1. This writ petition is filed by the school management. The petitioner is the school management which has challenged the judgment and order passed by the Presiding Officer, School Tribunal, Bombay dated 3-2-1994 allowing the appeal filed by the respondent no.1, calling in question the legality and validity of the termination order. The petitioner administers the school by name Maharashtra Madhyamik Vidyalaya at Malvan. The respondent no.1 came to be appointed as an Assistant teacher in the school with effect from 13-6-1988. The appointment of the respondent no.1 was against the vacancy reserved for backward class

candidate.

2. It is relevant to note that the respondent belongs to Other Backward Class category whereas the post was reserved for Schedule Tribe. As the candidate belonging to Schedule Tribe category was not available the respondent no.1 was appointed by the petitioner as an Assistant teacher. It is on account of this reason that the order of appointment was issued only for a period of one year as it was assumed by the petitioner that the candidate from any other Backward Class category cannot be substantively appointed in a vacancy earmarked for a particular category of the backward class.

3. The respondent no.1 issued a notice of termination and being aggrieved by the same respondent no.1 filed an appeal before the school tribunal bearing no.84/89. The school tribunal allowed the appeal and after setting aside the order of termination, ordered reinstatement of respondent no.1 vide its judgment and order dated 31-1-1990. The present petitioner being aggrieved by the order passed by the tribunal, filed W.P. No. 1449 of 1992. This court set aside the judgment and order passed by the tribunal and remanded the matter back to the tribunal for fresh decision, in the light of the observations made in the judgment of

the High Court. After the remand yet again the school tribunal heard the parties and it being of the view that the appointment of the respondent no.1 was on probation, has found fault with the termination order. During the pendency of the writ petition, the order passed by the school tribunal was not stayed and hence the respondent no.1 continues to be in the employment of the petitioner. The respondent no.1 has been in service of the petitioner for last about 20 years.

4. The learned counsel appearing for the respondent no.1 has relied upon the judgment of the Apex Court in **Shakuntala Ganpatsa Shirbhate Vs. Industrial Weaving Co-op Society reported in 1994 Mh.L.J. page 218** to contend that as the petitioner is the member of the other backward class referred to in Rule 9(7) he was entitled to regular appointment in the very first year as no person belonging to Scheduled Tribe category was available. Reliance is placed on the observations made in paras 4 and 5 of the judgment which reads thus:

> 4. "Several other questions were raised by the parties before the School Tribunal and the High Court, but since they are not being agitated now before us, we are not detailing the facts relevant to those questions. The

learned counsel for the appellant before us has contended that assuming the other findings recorded against her by the High Court to be correct, she is still entitled to regular appointment in view of Rule 9(a) of the Maharashtra Employees of Private School (Conditions of Service) Rules 1981, which is quoted below:-

> "(9)(a) In case it is not possible to fill in the teaching post for which a vacancy is reserved for a person belonging to a particular category of Backward Classes, the post may be filled in by selecting a candidate from the other remaining categories in the order specified in sub-rule (7) and if no person from any of the categories is available, the post may be filled in termporarily on an year to year basis by a candidate not belonging to the Backward Classes".....

Since the appellant is a member of one of the backward classes refered to in the said Rule, she was entitled to a regular appointment in

the very first year when no person belonging to a Nomadic Tribe was available.

5. The argument of the learned counsel appears to be well founded. Admittedly the respondent no.4 was available for appointment only in 1988. On the first occasion when the post was being filled up, there was no member of a Nomadic Tribe available for appointment. In the absence of a candidate belonging to a Nomadic Tribe, the Rule enjoins year to year appointment only if an available candidate does not belong to the backward classes. The question, therefore, is whether the appellant belongs to a backward class."

5. The respondent no.1 has also placed reliance on a judgment reported in **Kankavali Shikshan Sanstha and others Vs. M.R.Gavali and others reported in 2006(1) Mh.L.J. page 713** wherein yet again some issue arose for consideration and the Supreme Court held in almost identical set of facts that if the other backward category candidate is appointed on account of non-availability of Scheduled Tribe candidate then the candidate is entitled to appointment on regular basis and not on temporary basis. It is thus clear that the very first appointment of the petitioner has to be

treated as on probation and hence the appointment could only be validly terminated on account of unsatisfactory work or behaviour of the employee. That is not the reason for termination in the instant case. The tribunal has also observed in its judgment that the respondent no.1 was temporarily appointed though he belongs to OBC category and was appointed on account of non availability of a reserved category candidate of the Schedule Tribe. Thus the judgment and order passed by the tribunal does not call for any interference except to a limited extent and the same pertains to a direction in regard to payment of backwages.

6. The learned counsel for the petitioner has pointed out that section 9(9)(a) was not interpreted when the respondent no.1 was appointed in the year 1988 and the petitioner cannot be blamed for appointing the respondent no.1 on temporary basis. The learned counsel for the petitioner urges this court to quash that part of the order passed by the tribunal which goes to grant backwages from the date of termination till reinstatement. Responding very positively the learned counsel for the respondent no.1 fairly states that the petitioner be directed to prepare pay bill for 50% of the backwages and submit it to the Education officer and Education Officer be directed to

pass appropriate orders on the petitioner's entitlement of 50% of the backwages. The learned counsel for the respondent no.1 so also the petitioner makes a statement that no other person was appointed in the vacancy caused because of the termination of the respondent no.1 and no other employee has been paid any salary by the education officer. Hence I am of the clear view that to the extent of grant of full backwages, the order passed by the tribunal needs to be modified by directing the School Management/Head Master to submit the pay bills in regard to 50% of the salary of the respondent no.1 from the date of termination till reinstatement and the Education Officer in turn shall consider the claim in regard to payment of backwages to the extent of 50% in accordance with the law.

7. Hence writ petition is partly allowed. The petition although stands dismissed to the extent it challenges the order passed by the school tribunal, granting reinstatement with continuity in service to the repondent, the writ petition is allowed in regard to the grant of full backwages. The order impugned to the extend it grants backwages is quashed and set aside. Instead I direct the Petitioner/Head Master to forward the pay bills to the extent of 50% of the backwages from the date of termination till the date

of reinstatement to the education officer and the education officer is directed to consider the said proposal in accordance with the law and pass appropriate orders. Rule made absolute in above terms. ....